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IN THE
Supreme Court of the United States

NIKE, INC., *et al.*,
Petitioners,

v.

MARC KASKY,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of California

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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Pursuant to Rule 37.2 of the Rules of this Court, the Washington Legal Foundation (WLF) respectfully moves for leave to file the attached brief as *amicus curiae* in support of Petitioners. Petitioners have consented to the filing of this brief; its letter of consent has been lodged with the Clerk of the Court. Counsel for Respondent declined to consent, thereby necessitating the filing of this motion.

WLF is a non-profit public interest law and policy center with supporters in all 50 states, including many in California. WLF regularly appears before federal and state

courts to promote economic liberty, free enterprise, and a limited and accountable government.

In particular, WLF has devoted substantial resources over the years to promoting commercial speech rights, appearing before this Court in cases raising commercial speech issues. *See, e.g., Lorillard Tobacco Co. v. Reilly,* 121 S. Ct. 2404 (2001); *Greater New Orleans Broadcasting Ass'n v. United States*, 527 U.S. 173 (1999); *44 Liquormart, Inc. v. Rhode Island,* 517 U.S. 484 (1996). WLF recently successfully challenged the constitutionality of Food and Drug Administration restrictions on commercial speech. *Washington Legal Foundation v. Friedman*, 13 F. Supp. 2d 51 (D.D.C. 1998), *appeal dismissed,* 202 F.3d 331 (D.C. Cir. 2000).

WLF fully supports Petitioners' request that the Court grant review of both of the Questions Presented in this Petition. WLF writes separately in order to emphasize its particular concern over the second Question Presented and the California Supreme Court's apparent willingness to tolerate legal regimes that are likely to have a significant chilling effect on speech relating to issues of considerable public interest. WLF believes that the public interest in the dissemination of such speech will be undermined if the decision below is permitted to stand; that public interest exists regardless whether the speech at issue is labeled "commercial" or "noncommercial."

WLF is filing this brief because of its interest in promoting the welfare of the business community and the public at large; it has no interest, financial or other, in the outcome of this lawsuit. Because of its lack of direct economic interests, WLF believes that it can assist the Court by providing a perspective that is distinct from that of any party.

For the foregoing reasons, the Washington Legal Foundation respectfully requests that it be allowed to participate in this case by filing the attach brief.

Respectfully submitted,

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November 15, 2002

QUESTION PRESENTED

Amicus curiae addresses the following issue only:

Even assuming the California Supreme Court properly characterized the statements at issue in this case as "commercial speech," does the First Amendment, as applied to the states through the Fourteenth Amendment, permit subjecting speakers to the legal regime approved by that court in the decision below?

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BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTERESTS OF *AMICUS CURIAE*

The interests of *amicus curiae* Washington Legal Foundation (WLF) are set forth in the motion accompanying this brief.[1]

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[1] Pursuant to Supreme Court Rule 37.6, WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, contributed monetarily to the preparation and submission of this brief.

STATEMENT OF THE CASE

In the interests of brevity, WLF hereby incorporates by reference the Statement of the Case contained in the Petition for a Writ of Certiorari.

In brief, Petitioner Nike, Inc. is the world's leading athletic apparel and equipment manufacturer. It products are manufactured by subcontractors at more than 700 facilities around the world. During the past decade, numerous critics of Nike have alleged that workers at many of these overseas facilities have been subject to substandard working conditions. These allegations have been widely reported in newspapers and on television programs and have become an issue of significant public interest. Petition Appendix ("Pet. App.") 3a.

Nike has responded by denying the charges. These denials were disseminated in a variety of ways, including through press releases, letters to newspapers, and letters to university presidents and athletic directors. *Id.* 4a. Nike also took out full-page newspaper advertisements to publicize a report that concluded that there was no evidence of illegal or unsafe working conditions at Nike facilities in China, Vietnam, and Indonesia.

Some of the Nike denials reached consumers in California, including Respondent Marc Kasky. Kasky alleges that the denials were false, and that in disseminating them, Nike violated California's unfair competition law (UCL), Cal. Bus. & Prof. Code § 17200, and its false advertising law, Cal. Bus. & Prof. Code § 17500. He alleges that Nike made these false statements negligently and carelessly, Pet. App. 4a, and to induce consumers to purchase its products.

He does not claim to have been injured by Nike's statements, but he seeks injunctive relief -- including disgorgement of money earned due to the false statements -- and attorney fees.

The trial court sustained Nike's demurrer without leave to amend, holding that the complaint was barred by the First Amendment. The court held that Nike's denials constituted noncommercial speech and as such was protected under the First Amendment from the types of sanctions Kasky sought to impose. *Id.* 4a-5a, 80a. The California Court of Appeal affirmed. *Id.* 66a-79a.

By a 4-3 vote, the California Supreme Court reversed and remanded. *Id.* 1a-30a. Accepting as true the allegations of the complaint, the court determined that the Nike denials should be deemed commercial speech:

> Because in the statements at issue here Nike was acting as a commercial speaker, because its intended audience was primarily the buyers of its products, and because the statements consisted of factual representations about its own business operations, we conclude that the statements were commercial speech for purposes of applying state laws designed to prevent false advertising and other forms of commercial deception.

Id. at 23a. The court held that the Nike denials were not exempt from categorization as commercial speech simply because "they related to a matter of significant public interest or controversy." *Id.* Because it deemed the denials commercial speech and because Kasky alleged that the denials were false, the court held that the speech was not entitled to *any* First Amendment protection:

> [C]ommercial speech that is false or misleading receives no protection under the First Amendment, and therefore a law that prohibits only such unprotected speech cannot violate constitutional free speech restrictions.

Id. 27a. Reversing the decision to sustain Nike's demurrer, the court remanded the case to the Court of Appeal for further proceedings. *Id.* 30a.

REASONS FOR GRANTING THE PETITION

This case raises First Amendment issues of exceptional importance. There can be little doubt that the California Supreme Court's decision is chilling, and unless overturned will continue to chill, significant amounts of speech by corporations. The court expressed unconcern about such chilling effects, relying on statements by this Court that commercial speech is especially hardy and thus is unlikely to be chilled significantly by the sanctioning of false commercial speech.

But WLF ventures to guess that the Court never had in mind laws such as California's when it hazarded that assessment. As the decision below makes clear, it can often be very difficult -- both for corporations and courts -- to distinguish between commercial and noncommercial speech; that difficulty serves to magnify the chilling effect of the decision below. By permitting corporations to be haled into court and forced to defend their speech on matters of public concern based on an uninjured plaintiffs' mere belief that the speech is false, California has caused the entire business community to stand up and take notice. Business are likely to be far less willing to engage in such speech in light of those consequences. Even though the business may believe

that its speech is noncommercial, it may well be deterred from speaking by the fear that a reviewing court might reach the opposite conclusion.

Review is warranted in light of the profound impact the decision below is likely to have on the willingness of the business community to speak out on issues of public concern. The Court should consider whether the court below was correct in its determination that the First Amendment is indifferent to such impacts.

Review is also warranted because this case provides the Court with an excellent vehicle for re-examining the manner in which it addresses First Amendment protections for speech by commercial entities. In general, the Court has attempted to divide all such speech into one of two categories -- commercial and noncommercial -- and to allow that categorization alone to determine the level of First Amendment protection to be afforded.[2] That approach has been unsatisfying in several respects. First, as the Court has repeatedly conceded, there is no easy method by which commercial and noncommercial speech can be differentiated, yet the consequences of how the speech is classified are huge in terms of how far a State may go in regulating the speech. Second, allowing speech to be categorized in only two possible ways does not adequately take into account the numerous different forms that speech can take. WLF respectfully suggests that the Court grant review for the purpose of exploring alternative doctrines for determining the level of First Amendment protection to be afforded speech by

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[2] WLF agrees with Nike that the California Supreme Court erred in determining that the speech at issue here should be deemed commercial speech. But this brief does not focus on that issue.

commercial entities. In particular, the Court should consider whether to grant enhanced First Amendment protection to speech, regardless whether it is deemed commercial or noncommercial, if the speech address matters of significant public concern and/or the speech is neither a part of product labeling nor uttered for the *explicit* purpose of proposing a commercial transaction.

I. REVIEW IS WARRANTED BECAUSE OF THE SIGNIFICANT CHILLING EFFECT THE DECISION BELOW IS HAVING ON SPEECH BY COMMERCIAL ENTITIES ON ISSUES OF PUBLIC CONCERN

In the six months since the California Supreme Court issued its decision in this case, it has unquestionably succeeded in causing the business community to stand up and take notice. The decision has garnered widespread publicity and led to numerous warnings within the business community that commercial entities need to be much more careful in commenting on issues of public concern, in order to avoid potential liability in a California court. *See, e.g.*, "Swoosh Goes the First Amendment," *Wall Street Journal* (May 14, 2002) ("lawyers will counsel their business clients to withdraw from the public arena. lest they open themselves up to a lawsuit over an advertisement or op-ed article"); Clark S. Judge, "*Kasky v. Nike*: U.S. Supreme Court Review Can Protect Free Public Debate," Washington Legal Foundation *Legal Opinion Letter* (Sept. 20, 2002).

Nike in its petition has cogently explained all the reasons why the decision below is having a significant chilling effect on speech by commercial entities. Petition 23-30. WLF will not repeat that explanation here. The

California Supreme Court suggested that this chilling effect was actually a good thing:

> To the extent that application of these laws may make Nike more cautious, and cause it to make greater efforts to verify the truth of its statements, these laws will serve the purpose of commercial speech protection by "insuring that the stream of commercial information flow[s] cleanly as well as freely." (*Va. Pharmacy Bd. v. Va. Consumer Council, supra*, 425 U.S. [748] at pp. 772 [(1976)].

Pet. App. 22a.

That statement makes several erroneous assumptions. First, it simply is not true, as alleged by the court below, that multinational corporations such as Nike are "in a position to readily verify the truth of any factual assertions" it makes regarding the way that its workers are treated. *Id.* It is difficult enough for an American company to do a complete investigation and get to the bottom of, say, a sex discrimination claim raised by a worker in an American facility. It can be darned near impossible for the same company to get to the bottom of a similar claim raised by a worker in the Far East. Thus, while the court is correct that its ruling will likely cause corporations to be "more cautious" in commenting on issues of this sort, the inability of a company ever to satisfy itself with absolute certainly regarding such issues may well cause the company simply to say nothing. Second, the court's statement overlooks *any* company's natural fear that, no matter how satisfied it is that a statement is true, there is always the possibility that a reviewing court will reach the opposite conclusion -- thereby exposing the company to enormous liability and litigation

costs. If, as appears likely in this case, those fears cause a company to refrain from speaking out on issues it might otherwise have addressed, then the court's decision will not cause the stream of commercial information to run more clearly but rather to dry up.

In the end, the California Supreme Court simply assumed on faith that its decision would having little chilling effect on speech. The court reasoned:

> Because Nike's purpose in making these statements, at least as alleged in the first amended complaint, was to maintain its sales and profits, regulation aimed at preventing false and actually or inherently misleading speech is unlikely to deter Nike from speaking truthfully or at all about the conditions in its factories.

Pet. App. 22a. But the court's conclusion is far from self-evident: that based solely on the assumption that Nike seeks "to maintain its sales and profits," Nike will -- despite the court's opinion -- continue to conduct a public relations campaign regarding the conditions in its factories.[3] A company that seeks to increase its sales and profits can select from numerous options for achieving that goal. Corporate image advertising -- for example, an advertisement depicting a famous athlete working out while wearing clothing displaying the Nike insignia -- is one such option. Moreover,

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[3] Significantly, Nike states that it has determined that "the risk of suits in California asserting the *Kasky* theory is too great to release publicly anywhere in the world its next annual Corporate Responsibility Report, the company's single most important document describing its initiatives and progress on matters such as labor compliance, community affairs, sustainable development, and workplace programs." Pet. 28.

such advertising has as one of its greatest attractions the fact that, because it contains no statements of fact, it almost surely will not become the target of litigation. Accordingly, as California increases its constraints on corporations that seek to speak out on issues of significant public interest, such speech will be chilled as businesses turn to promotional techniques with fewer down sides.

The California Supreme Court also indicated its belief that this Court has determined *as a matter of law* that there is no danger that commercial speech will be significantly chilled by increased levels of speech restrictions. The court said:

> The reason that it is "less necessary to tolerate inaccurate statements for fear of silencing the speaker" of commercial speech is not that such speech concerns matters of lesser public interest or value, but rather that commercial speech is both "more easily verifiable by its disseminator" and "less likely to be chilled by proper regulation." (*Va. Pharmacy Bd. v. Va. Consumer Council, supra,* 425 U.S. at p. 772, fn. 24.

Pet. App. 24a.

WLF submits that this Court's statement regarding the greater hardiness of commercial speech in the face of speech restrictions was simply an observation based on the evidence available to the Court in the 1970s. It is highly unlikely that the Court anticipated California's significantly stepped-up regulation of commercial speech and the chilling effect that regulation has had on commercial speech throughout the country. It is also unlikely that the Court thought that the chilling effect would apply equally across the board to all types of commercial speech; the evidence cited by Nike, for

example, suggests that the effect is much more pronounced with respect to speech on matter of significant public concern than it is in other areas. Review is warranted both because the decision below is having such a large impact on speech by the business community and because it is having its greatest impact on the very type of speech society ought to be encouraging most: speech on issues of significant public concern.

II. REVIEW IS WARRANTED BECAUSE THE CASE PROVIDES AN EXCELLENT VEHICLE FOR RE-EXAMINING FIRST AMENDMENT PROTECTIONS FOR COMMERCIAL ENTITIES

This case well illustrates the inflexibility of the Court's current commercial speech doctrine. Once (as here) speech is deemed commercial in character, it is subject to a uniform, reduced level of First Amendment protection. That uniform level of protection applies regardless of the value society places on the speech at issue and regardless of its susceptibility to being chilled by government regulation. Many would argue that the speech being regulated in this case (a major corporation's response to attacks on its labor policies at plants throughout the world) is speech of great public importance and ought to be encouraged. But under the California Supreme Court's ruling, the speech is subject to the same level of First Amendment restrictions as a Nike advertisement stating the price and other terms of sale for a pair of running shoes. Granting review in this case would allow the Court to consider the appropriateness of applying factors other than the commercial speech/noncommercial speech distinction in determining the level of First Amendment protection to be granted speech by commercial entities.

Within the noncommercial speech arena there is precedent for basing the level of First Amendment protection on the public importance of the speech in question. In *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985), this Court held that the First Amendment does not prohibit States from permitting the award of presumed or punitive damages in libel cases involving wholly false speech where the defamatory statements do not involve *matter of public concern*, even in the absence of a showing of "actual malice." *Dun & Bradstreet*, 472 U.S. at 755-61 (plurality).[4] The Court thus declined to extend its ruling in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), which held that a showing of "actual malice" was required before such damages could be awarded in libel cases in which the false and defamatory statements *did* involve matters of public concern. By granting review in this case, the Court could consider whether to extend the distinction between speech involving matters of public concern and speech not involving matters of public concern from the noncommercial speech arena to the commercial arena. Doing so would ensure greater First Amendment protection for *all* forms of speech (*i.e.*, both commercial speech and noncommercial speech) involving matters of public concern.

Granting review in this case would also allow the Court to consider whether to calculate the level of First Amendment protection afforded commercial entities based on whether the speech directly concerns the characteristics of a product or service. A State's interest in sanctioning false commercial speech undoubtedly is at its highest when the speech *does* directly concern the characteristics of the commercial

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[4] *Dun & Bradstreet* involved a credit report on a private entity that admittedly included false information.

speaker's product or service (*e.g.*, the price, efficacy, quality, value, or safety). It is precisely such speech that consumers are most likely to rely on when making purchase decisions. In contrast, the speech by Nike at issue in this case may have led consumers to feel more warmly about the company and ultimately more likely to purchase a Nike product, but it is highly unlikely that a consumer would rely on Nike's statements regarding its overseas labor record as his primary basis for buying a specific product. The unlikelihood of such reliance suggests that a greater level of First Amendment breathing room ought to be afforded to statements regarding labor record or similar statements regarding general company policy. WLF notes that Justice Brown, in her dissent from the decision below, suggested that this Court consider granting lower levels of First Amendment protection to speech by commercial entities that touches upon the characteristics of a product or service that the entity offers for sale. Pet. App. 62a (Brown, J., dissenting).

Finally, granting review in this case would allow the Court to consider whether to base the level of First Amendment protection on the proximity of the speech at issue to a specific sales transactions. Where there is close proximity -- for example, the speech at issue is on a product label or is part of an advertisement explicitly exhorting consumers to purchase a product -- there is greater reason for the Court to allow tighter State control over what the seller may say. In contrast, the Nike public relations materials at issue in this case were never disseminated in connection with any direct sales pitches -- suggesting that those materials should be given greater First Amendment protection. WLF notes, for example, that a federal district court has held that the First Amendment protects the right of a pharmaceutical company to send peer-reviewed medical journal articles to a

doctor, even though the articles contain discussion of unapproved uses for the company's product; but the court would *not* have upheld such a company's First Amendment right to insert the same journal article into a package containing drugs the company is trying to sell. *Washington Legal Found. v. Friedman*, 13 F. Supp. 2d 51 (D.D.C. 1998), *appeal dismissed*, 202 F.3d 331 (D.C.Cir. 2000).

On several occasions in recent years, various members of the Court have expressed dissatisfaction with the Court's current commercial speech doctrine. *See, e.g., 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 518 (1996) (Scalia, J., concurring). This case would provide the Court with an excellent vehicle for considering changes in that doctrine.

CONCLUSION

The Washington Legal Foundation respectfully requests that the Court grant the petition for a writ of certiorari.

Respectfully submitted,

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